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Supreme Court of the United States

OCTOBER TERM, 1952

No. 792

KENNETH POWELL DAVIS
Petitioner

v.

UNITED STATES OF AMERICA
Respondent

Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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INDEX

Subject Index

	PAGE
Opinion below	2
Jurisdiction	2
Questions presented	2
I.	2
How involved	2
Question one	3
Question two	3
II.	3
How involved	3
Question three	4
III.	4
Question four	4
Statutes and regulations involved	5
Statement of the case	8
The facts	8
Reasons for granting the writ	14
I.	14
II.	18
III.	20
IV.	24
Conclusion	27

Cases Cited

Bowles v. United States	
319 U. S. 33, 35	22
Cox v. Wedemeyer	
192 F. 2d 920 (9th Cir. 1951)	21, 23
Davis v. United States	
199 F. 2d 689 (6th Cir.)	14, 15, 19
Niznik v. United States	
184 F. 2d 972 (6th Cir.)	25

PAGE

United States v. Di Re
332 U. S. 581, 593 24
United States v. Garvin
71 F. Supp. 545 (W. D. Pa.) 25
United States v. Graham
108 F. Supp. 794 (N. D. N. Y.) 16
United States v. Knight
No. 20283 Criminal, Northern District of Ohio, April 25, 1951 23
United States v. Laier
52 F. Supp. 392 (N. D. Calif. S. D.) 16
United States v. Mansavage
178 F. 2d 812 (7th Cir.) 23
United States v. Peterson
53 F. Supp. 760 (N. D. Calif. S. D.) 16
United States v. Romano
103 F. Supp. 597 (S. D. N. Y. 1952) 16
United States v. Stephens
No. 20284 Criminal, Northern District of Ohio, April 25, 1951 23
United States v. Zieber
161 F. 2d 90 (3rd Cir.) 16, 25, 27

STATUTES AND REGULATIONS CITED

Department of Justice Circular—
No. 3461, Supplement No. 9, September 28, 1943 22
No. 3461, August 4, 1944 22
No. 4063, Supplement No. 2, December 6, 1948 22
No. 4063, Supplement No. 5, July 18, 1949 22
Federal Rules of Criminal Procedure, Rules 37 (b), 45 (a) 2
Local Board Memorandum No. 41, Selective Service System, issued
Nov. 30, 1951, as amended Aug. 15, 1952 21

PAGE

Regulations, Selective Service (32 C. F. R. § 1602 *et seq.*)

—Section—

1622.1 21

1622.2 21

1623.2 21

1624.1 (a) 2, 6

1624.2 ..... 6, 18

1624.2 (b) 2

1624.3 7

1626.25 ..... 3, 5, 6

United States Code

Title 28, § 1254 (1) 2

Title 50, App. §§ 451-470 ("Selective Service Act of 1948")

—Section—

6 (j) 3, 5

12 (a) 5, 8

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MAY IT PLEASE THE COURT:

The petitioner, Kenneth Powell Davis, says that a writ of certiorari ought to issue to review the judgment of the court below. That court erroneously overruled important questions of law. The court also decided questions directly in conflict with decisions in other circuits by affirmance of the conviction.

Opinion Below

The opinion of the court of appeals [66][1] is not yet reported.

Jurisdiction

The judgment of affirmance was entered April 15, 1953. This Court has jurisdiction under 28 U. S. C. 1254 (1).—See also Rules 37 (b) and 45 (a), Federal Rules of Criminal Procedure.

Questions Presented

I.

How Involved

Section 1624.1 (a) of the Selective Service Regulations gave Davis the right for an oral hearing upon personal appearance before members of the draft board. (32 C. F. R. § 1624.1 (a)) Section 1624.2 (b) of the regulations gave him the right to (1) discuss the classification, (2) point out classifications desired, (3) call attention to evidence overlooked or not weighed by the board, and (4) present new and additional evidence.

Davis appeared before the board prepared to exercise fully his rights under the regulations. He requested to discuss his classification and point out omissions. The chairman of the board denied him the right to discuss his case and referred him to the appeal board. When he attempted to speak, over objections, he was stopped by the board and not given a chance to see his file.

Davis testified extensively about the denial of the hearing. He stated his purpose in going before the board in a

[1] Numbers appearing herein within brackets refer to pages of the printed record in this case.

letter taking his case to the appeal board. He wrote: "I briefly stated my reasons for coming before them." This statement of purpose of his visit occurred before he was denied rights guaranteed by the regulation.

The court below held that failure of Davis to complain of the denial of hearing on appeal, his statement that he told the board his reasons for asking for a hearing and the later decision of the appeal board reclassifying him in I-A, which was conclusive against collateral attack, did not "avoid the classification". [72]

Question One

Whether the denial of a full and fair hearing upon personal appearance before the local board is made immune to collateral attack because of the *de novo* classification by the appeal board?

Question Two

Whether the letter from Davis to the appeal board stating that he gave his reasons for coming to the local board to it upon personal appearance and his failure to complain of the denial of a full and fair hearing constitute a waiver of the denial of his rights guaranteed by the regulations upon personal appearance?

II.

How Involved

Section 6 (j) of the Selective Service Act (50 U. S. C. App. § 456 (j), 62 Stat. 609) provides for an appropriate inquiry and hearing upon an appeal for a local board denial of the conscientious objector status. Section 1626.25 of the Selective Service Regulations implements the act. It makes a full inquiry and fair hearing in the Department of Justice mandatory.

On appeal the case of Davis was referred by the board to the Department of Justice for appropriate inquiry and hearing. The United States Attorney ordered the Federal Bureau of Investigation to determine whether Davis was claiming classification as a minister and ordered an interview of Davis to obtain a signed statement waiving his conscientious objection. An agent of the F.B.I. told Davis that his conscientious objector claim was inconsistent with his claim for exemption as a minister and that he would have to elect between the two. Davis, as a result, signed the statement withdrawing his conscientious objector claim. Immediately the appeal board classified him in I-A without the required appropriate inquiry and hearing required by the statute and regulation.

Question Three

Whether Davis was denied a full inquiry and fair hearing in the Department of Justice by being illegally induced by the agent of the Federal Bureau of Investigation to sign a statement waiving his claim as a conscientious objector?

III.

Question Four

Whether error was committed by the trial court in refusing to give instructions to the jury about the denial of a full and fair hearing before the local board and the illegal taking of involuntary waiver of the conscientious objector status by an agent of the Federal Bureau of Investigation?

Statutes and Regulations Involved

The indictment was returned pursuant to the provisions of Section 12 (a) of the Selective Service Act of 1948 (50 U. S. C. App. § 462 (a), 62 Stat. 622). Section 6 (j) of the Selective Service Act of 1948 reads:

> "Upon the filing of such appeal, the appeal board shall refer any such claim to the Department of Justice for inquiry and hearing. The Department of Justice, after appropriate inquiry, shall hold a hearing with respect to the character and good faith of the objections of the person concerned, and such person shall be notified of the time and place of such hearing. The Department of Justice shall, after such hearing, if the objections are found to be sustained, recommend to the appeal board that (1) if the objector is inducted into the armed forces under this title, he shall be assigned to noncombatant service as defined by the President, or (2) if the objector is found to be conscientiously opposed to participation in such noncombatant service, he shall be deferred. If after such hearing the Department of Justice finds that his objections are not sustained, it shall recommend to the appeal board that such objections be not sustained. The appeal board shall, in making its decision, give consideration to, but shall not be bound to follow, the recommendation of the Department of Justice together with the record on appeal from the local board."

Section 1626.25 of the Selective Service Regulations (32 C. F. R. § 1626.25) provides for the procedure to be followed by the board of appeal and the Department of Justice in

the case of an appeal by a registrant who claims to be a conscientious objector.

Section 1626.25 (a) (1) provides that the board must determine if the registrant may be put in a lower class. Section 1626.25 (a) (2) provides that if the conscientious objector claim is not sustained by the board, the entire file shall be transmitted to the Department of Justice. Section 1626.25 (a) (4) provides for seeking an advisory recommendation by the Department of Justice.

Section 1626.25 (c) provides that the Department of Justice shall "make an inquiry and hold a hearing on the character and good faith of the conscientious objections of the registrant".

Section 1624.1 (a) of the regulations provides that the registrant "shall have an opportunity to appear in person before the member or members of the local board designated for the purpose".—32 C. F. R. § 1624.1 (a), page 801.

Section 1624.2 of the Selective Service Regulations provides:

> "1624.2 *Appearance Before Local Board.*—(a) At the time and place fixed by the local board, the registrant may appear in person before the member or members of the local board designated for the purpose. The fact that he does appear shall be entered in the 'Minutes of Actions of Local Board and Appeal Board' on the Classification Questionnaire (SSS Form No. 100).
>
> "(b) At any such appearance, the registrant may discuss his classification, may point out the class or classes in which he thinks he should have been placed, and may direct attention to any information in his file which he believes the local board has overlooked or to which he believes it has not given sufficient weight. The registrant may present such further information as he believes will assist the local board in determining his proper

classification. Such information shall be in writing, or, if oral, shall be summarized in writing and, in either event, shall be placed in the registrant's file. The information furnished should be as concise as possible under the circumstances. The member or members of the local board before whom the registrant appears may impose such limitations upon the time which the registrant may have for his appearance as they deem necessary.

"(c) After the registrant has appeared before the member or members of the local board designated for the purpose, the local board shall consider the new information which it receives and shall again classify the registrant in the same manner as if he had never before been classified.

"(d) After the registrant has appeared before the member or members of the local board designated for the purpose, the local board, as soon as practicable after it again classifies the registrant, shall mail notice thereof on Notice of Classification (SSS Form No. 110) to the registrant and on Classification Advice (SSS Form No. 111) to the persons entitled to receive such notice or advice on an original classification under the provisions of section 1623.4 of this chapter.

"(e) Each such classification shall be followed by the same right of appeal as in the case of an original classification."—32 C. F. R. § 1624.2, page 802.

Section 1624.3 of the Selective Service Regulations provides:

"1624.3 *Induction Postponed.*—A registrant shall not be inducted during the period afforded him to appear in person before a member or members of the local board, and if the registrant re-

quests a personal appearance he shall not be inducted until 10 days after the Notice of Classification (SSS Form No. 110) is mailed to him by the local board, as provided in paragraph (d) of section 1624.2."—32 C. F. R. § 1624.3, page 802

Statement of the Case

The indictment charged Davis with the violation of Section 12 (a) of the Selective Service Act of 1948. (50 U. S. C. App. § 462 (a)) It charged that Davis was liable for training and service after a determination by the draft board. It alleged that he evaded or refused to perform the duty required of him under the act. He refused to submit to induction. [12] Davis pleaded not guilty. He was tried before a jury. The court charged the jury at the close of the evidence. [47-55] Requests were refused. [55-59] The jury found the petitioner guilty. [59] He made a motion for new trial. (2-3, 59-60] The motion for new trial was overruled. [3-4, 64] Davis was given a three-year sentence. [1-2, 4] Davis duly appealed. [4-5] The court of appeals affirmed the judgment of conviction. [76]

The Facts

Petitioner was born May 6, 1928. [6, 40] He registered with Local Board No. 52, Norton, Kansas, in 1948. [20] A classification questionnaire was mailed to him September 14, 1948. [6] An employee of the local board assisted petitioner in filling out the form. [9, 20] After it was filled out the form was filed with the local board on September 23, 1948. [20]

In the questionnaire petitioner showed that he was engaged in farm work as a sharecropper. [7] He indicated 8 years of elementary schooling and over one year of high school training. [8] He neglected to sign the blank signature line under a request that the conscientious objector

form be forwarded to him. [8, 43] This is Series XIV of the questionnaire. [8]

On October 12, 1948, petitioner was placed in Class I-A. [9, 20] On November 29, 1948, petitioner and his landlord-employer appeared before the board for a farm deferment, which was granted for a period of one year ending November 29, 1949. [9, 20, 24]

On February 10, 1950, the local board received a letter from Davis requesting that he be exempted as a minister of religion and placed in Class IV-D. [25-26] In this letter he also requested the board to send him the special form for conscientious objector. [26]

On February 20, 1950, petitioner was again placed in Class I-A by his local board. [9, 20-21] He filled out the special form which was received by the local board on February 24, 1950. [15-19, 21] In this special form for conscientious objector he signed series I (B). [15] He answered in the form that he believed in the Supreme Being and that he owed obligations to God that were superior to any owed the state. [15] He also pointed out that he was a soldier of Jesus Christ and that his weapons of such army were not carnal but confined to the use of the Scriptures, all of which he stated caused him to have a belief involving duties superior to that arising from any human relation. He positively stated that he was a conscientious objector to both combatant and noncombatant military service. [15]

He showed further in the form that he had acquired his conscientious objections through long Bible study at home with his parents, as well as with Jehovah's witnesses in their meeting places since 1947. [15-16] He pointed out that he relied upon Jehovah's witnesses for religious guidance. [16] He positively stated that he did not believe in the use of force except in the case of defense. [16] He pointed out his attendance at meetings of Jehovah's witnesses and his preaching the gospel of God's kingdom as

proof of his good-faith conscientious objections to military service. [16] He certified that he had often given public expression to his conscientious objections. [16-17] He listed the schools that he had attended and gave his employment record. [17] He indicated that he had never been a member of a military organization. [17]

In the special form for conscientious objector petitioner stated further that the organization with which he was associated was Jehovah's witnesses, of which the Watchtower Bible and Tract Society, Inc., was the legal governing body. [17] He gave the location of the church that he attended, the name of the presiding minister and other references to corroborate his claim as a conscientious objector.

On March 7, 1950, the local board mailed petitioner notice of his I-A classification. [9, 21] On March 14, 1950, petitioner in writing requested a hearing and personal appearance before the local board. This was received by the local board on March 15, 1950. [14-15, 22] On March 23, 1950, the local board wrote petitioner stating that the board met every 90 days and that he would be notified of the time and place for personal appearance. [22-23] On May 19, 1950, petitioner was notified to appear before the local board on May 23, 1950, at 2:00 P. M. [14]

Petitioner appeared at the time and place specified for the requested hearing. He was accompanied by his brother, Creighton C. Davis. [36] Petitioner's brother testified that petitioner was prepared to present and explain his conscientious objections to the board. [37] Petitioner informed the board that he wanted to discuss his classification and point out from his file that he was a minister and a conscientious objector. [41-42] When petitioner and his brother entered the office of the local board, the hearing began by a statement by petitioner that he had further evidence to present and that he wanted to discuss the evidence in his file. [37, 41] The chairman of the board stated:

"It won't do you any good because we are set, and if you get any other classification than I-A, you will have to go to a higher authority than we are." [42, see also 37]

Petitioner attempted to speak further about his case but was stopped from doing so by the board. [37, 42] He did not even see his file while at the board for the hearing. No person made any notes whatever as to what was said upon the personal appearance. [42] The board asked petitioner if he did not have a brother in the Coast Guard during World War II and also one "who went to the penitentiary". The board members then added that they respected the brother who was in the Coast Guard but did not respect the one who went to prison. [37] The board members then mentioned the failure of Jehovah's witnesses to salute the flag and one member stated, "he would gladly force anyone into the front lines with a bayonet if he would not salute the flag." [37] The board members thereupon ordered petitioner from the room. [37]

Following the personal appearance petitioner was placed in Class I-A by the local board on May 23, 1950. [9, 21, 42] He was mailed notice of this classification on May 25, 1950. [9, 21] On June 1, 1950, petitioner wrote a letter requesting an appeal to the board of appeal. [21, 42]

On a preliminary consideration the appeal board denied petitioner his claim for exemption as a minister of religion (Class IV-D) and ordered the case referred to the Department of Justice for investigation and hearing upon the claim for classification as a conscientious objector. [9, 21] On August 30, 1950, the draft board file was transmitted to the Department of Justice for the investigation and hearing required by the act and regulations. [21] On August 31, 1950, the United States Attorney, being in receipt of the file, notified the Department of Justice the appeal board had "determined that Registrant is not entitled to a class lower than IV-D or in Class IV-D".

[44] The United States Attorney forwarded registrant's file with this letter to the Department of Justice. [44]

A memorandum made by the Department of Justice shows that the Federal Bureau of Investigation received authority "from United States Attorney Lester Luther to interview registrant for the purpose of obtaining a signed statement" from petitioner waiving his conscientious objections to combatant and noncombatant military service. [44] On September 20, 1950, a special agent of the Federal Bureau of Investigation, W. H. Norton, interviewed petitioner. He went to petitioner's place of employment and took him to Norton's automobile where he talked to petitioner "for 45 minutes or an hour and took the statement". [31] "Mr. Norton asked him if he was a minister and then stated: 'Well, you are a minister then and you want a minister's classification?' Defendant told the agent that he was entitled to a minister's classification. Mr. Norton then said that the two classifications, the IV-E and the IV-D, conflicted and the appeal board couldn't give defendant the correct consideration on both of them, so if he wanted a minister's classification the thing for him to do was to withdraw the conscientious objector's claim. He wrote out the statement withdrawing the conscientious objector's claim and defendant signed it. He stated to defendant that only one claim would be considered by the appeal board. He then dismissed defendant without further explanation and without giving him a copy of the statement he signed." [42]

The typewritten waiver prepared by the special agent of the F.B.I., among other things, states as follows:

"I hereby state I am not a conscientious objector and withdraw my claim as such. In appealing from the classification of the Local Draft Board at Norton, Kansas, I requested classification in IV-D as a minister and I rely solely on that claim and do not wish to be classified in classification IV-E or I-A-O. I understand that by signing

this statement no further consideration will be given my conscientious objector claim." [45]

The memorandum of the Department of Justice made after the taking of this statement reads: "Inasmuch as Registrant has withdrawn his claims as a conscientious objector, no further investigation is being conducted by this office." [45] The case of petitioner before the Department of Justice was closed and a report was made by the Federal Bureau of Investigation to the United States Attorney disclosing that the conscientious objector claim had been withdrawn. This is shown in a letter from the United States Attorney to the appeal board, dated September 26, 1950. [46] The United States Attorney advised the appeal board that the file was being returned pursuant to "Department of Justice circular No. 4063, supplement No. 5". [46]

The appeal board on October 24, 1950, classified petitioner I-A. [9, 21] Notice of this I-A classification was mailed to petitioner on October 31, 1950. [9, 21] This notice was received by petitioner. [47]

On November 20, 1950, petitioner was ordered to report for induction. [9, 21] On November 27, 1950, there was a request for a transfer of the case to Kansas City, Missouri, for induction. [21] On December 5, 1950, the state director wrote petitioner that there was no cause for appeal to the president because there was no dissenting vote and that petitioner had been accorded all his rights by the local board and appeal board. [27]

Thereafter, on December 9, 1950, the State Director of Kansas requested a stay of induction and called the file of petitioner in for review. [21]

On February 15, 1951, the local board mailed petitioner a new order to report for induction. [21] On February 21, 1951, again a request was made for a transfer of the case to Kansas City. [21] The file of the registrant was transferred to Kansas City, Missouri, for the purpose of in-

duction. [21, 27-28] An order issued by the transfer board at Kansas City, Missouri, commanded petitioner to report for induction on March 22, 1951. [27-28] On March 23, 1951, after he completed the selective process, petitioner was ordered to take one step forward from the line-up of selectees, which constituted induction into the armed forces. He refused to step forward and submit to induction. He was taken from the induction room, and after the officers attempted to persuade him to enter the armed forces, he refused induction. [28-29] The report of registrant's refusal to submit to induction appears in the file and states that petitioner's claim for classification as a conscientious objector "was borne out by the entry in Item #4, DD Form 47 of registrant, but his classification card indicated I-A". [19]

Reasons for Granting the Writ

Important questions of federal law are involved. The decision below is in conflict with holdings of other courts of appeals. The importance of the questions and the conflict shall now be demonstrated.

I.

Whether the denial of a full and fair hearing upon personal appearance before the local board is made immune to collateral attack because of the *de novo* classification by the appeal board?

The holding of the court below on this question is directly in conflict with *Davis* v. *United States*, 199 F. 2d 689 (6th Cir.). In that case the facts are identical to the facts in this case.

There appellant requested a personal appearance. Here the appearance was requested. There appellant was notified to appear and did appear. Here petitioner was noti-

fied to appear and did appear. There the appellant made a brief introduction of his purpose in appearing before the board. Here petitioner made a brief statement of the purpose for appearing before the board. There the board denied the appeal rights guaranteed by the personal appearance regulation. Here the identical right was refused by the local board. There appellant was told that he would have to file "a letter with the local draft board for the appeal board". Here petitioner was told that he would have to appeal his case. There appellant appealed in writing within 10 days. Here petitioner likewise appealed in writing within 10 days. In that case the appeal board denied the conscientious objector status, classifying appellant I-A. Here the appeal board classified petitioner I-A.

The only difference in the two cases is in that *Davis* case the National Selective Service Appeal Board finally classified the appellant. Here petitioner's case did not go that far.

In that case the court held that the denial of the right to (1) discuss his classification, (2) direct attention to information overlooked, and (3) submit new information was a denial of procedural due process of law. The court said:

> "It is to be emphasized that the purpose of the registrant's personal appearance is not solely to present new information, but to enable the registrant to discuss his classification with members of the board on the basis of the information already furnished, when given proper weight, calls for a different classification. 'The right to have such an opportunity to talk over and explain his case to members of the board is obviously of the greatest value to a registrant even though he has no new information to present and this right the regulation guarantees.' *United States* v. *Stiles*, 169 F. (2d) 455, 458 (C. A. 3). The test of whether a draft board's action may be attacked is whether it

> receives and considers what a particular registrant submits. Ex parte *Stanziale,* 138 F. (2d) 312 (C. A. 3). . . . The failure to allow such discussion was a violation of the regulations and, because of denial of due process, the action of the board in classifying appellant was void."

The holding of the court below directly conflicts with the holding of the United States Court of Appeals for the Third Circuit in *United States* v. *Zieber,* 161 F. 2d 90. The court below held that the *de novo* classification by the board of appeal cured the violations of regulations guaranteeing rights upon personal appearance. To the contrary, the court in the *Zieber* case said:

> "Moreover, a failure by the Local Board to perform the duties imposed upon it by the Selective Training and Service Act and the regulations could not have been cured by the *de novo* consideration of Zieber's classification by the Appeal Board if material which should have been included by the Local Board in Zieber's file was not included so that the Appeal Board could consider it."

Several district courts have held that violations of procedural due process by a local board cannot be cured through a determination by an appeal board. (See *United States* v. *Romano,* 103 F. Supp. 597 (D. C. N. Y. S. D. 1952).) There the district judge referred to the holding in *United States* v. *Laier,* 52 F. Supp. 392 (D. C. Calif. N. D. S. D. 1943). He stated that the judge in that case "explicitly rejected the Government's contention in that case that the appeal the registrant took to the Board of Appeals cured any error the local board might have committed". The same conclusion was reached in *United States* v. *Graham,* 108 F. Supp. 794 (D. C. N. Y. N. D. 1952).—See also *United States* v. *Peterson,* 53 F. Supp. 760 (D. C. Calif. N. D. S. D. 1944).

Had the ground for affirmance been that the local board gave Davis an illegal classification (rather than violated his procedural rights) the point urged by the court below might have some materiality. It has none. It should be remembered that the appeal boards only classify. That is what the appeal board did in this case.

That board did not reverse and remand the classification to the local board to correct the errors of procedure. It merely classified Davis. Its classification sank in the same procedural quicksand where the one given by the local board was found. Since the first question involved in this case was based on procedural errors, rather than an erroneous classification by the local board, the determination by the appeal board is immaterial.

It is respectfully submitted that on this phase of the case there is involved a conflict between the holding below and those of the courts of appeals for the Third Circuit and the Sixth Circuit.

Should the court find no conflict, it seems obvious that there is a highly important question of national importance. It is of national concern to have it finally determined by this Court whether the Selective Service Regulations guaranteeing procedural due process of law can be flouted and defied merely because there has been a reclassification by the board of appeal. The regulation is made meaningless if the holding below is allowed to stand. There are hundreds of draft boards and a multitude of registrants who are entitled to have this court declare the law for their guidance.

The holding of the court below in the face of the regulations and the decisions of the other courts to the contrary produce an irreconcilable conflict that ought to be settled by this court. It raises before this Court, therefore, an important question of law that ought to be determined once and for all by this Court. These are clear grounds why this Court ought to grant certiorari.

II.

Whether the letter from Davis to the appeal board stating that he gave his reasons for coming to the local board upon personal appearance and his failure to complain of the denial of a full and fair hearing constitute a waiver of the denial of his rights guaranteed by the regulations upon personal appearance?

In his letter taking an appeal Davis wrote: "I briefly stated my reasons for coming before them." [10] By no stretch of the imagination or by the most extreme inference of fact can it be assumed that this statement spells that he got a full and fair hearing before the local board. This part of the letter of appeal referred to his statement of his purpose in asking for a hearing.

When petitioner stated his purpose in coming for the personal appearance, the board prevented him from giving his evidence, discussing his case, arguing his classification and pointing out parts of the file that he wanted to point out. See the testimony. [37, 41-42] His introduction or statement of a purpose for his visit without being able to discuss his case, point out things in his file and give new evidence did not constitute a hearing contemplated by Section 1624.2 of the regulations. It was not a matter of time limitation with the board. It was that petitioner would not be heard regardless of how long he appeared before the board.

There is nothing in the regulations that requires that a registrant assign errors of procedure committed by the local board. The registrant is not dealt with as though he were a lawyer. Being a layman and uneducated in the law he may not have his rights to get a determination of the denial of procedural rights forfeited because of his failure to make assignments of error to the board of appeal, especially when there is no such procedure established. The appeal board, moreover, merely classifies. It exercises no

power to reverse and remand a case to the local board for errors of procedure committed by it.

It is plain that the facts that transpired upon personal appearance in this case are the same as what took place in the case of *Davis* v. *United States*, 199 F. 2d 689 (6th Cir.). In that case a brief introduction by the registrant resulted in a sudden denial of the exercise of the rights guaranteed by the regulations. The same thing occurred here. The holding in the case below is directly in conflict with the holding of the Court of Appeals for the Sixth Circuit in *Davis* v. *United States*, 199 F. 2d 689. This conflict on this question gives jurisdiction to this Court.

The court of appeals woefully misinterpreted the record in this case when it held that Davis stated to the board of appeal that he exercised his rights guaranteed by the regulations. The court of appeals was bound to give a reasonable interpretation to the record. It was not authorized to blow up and stretch the facts to the point of bursting. The stretching of the facts here has caused the truth to explode in the face of the court below.

When Davis wrote "I briefly stated my reasons for coming before them", he did not tell the board of appeal that he exercised his rights guaranteed by the regulations. It is of national importance to litigants to have the records in their case properly interpreted. The unreasonable construction placed upon the record by the court below defies the record. It is itself without "basis in fact". This sort of straining out the gnat and swallowing the camel produces such an abnormal bulge in the symmetry of the law that it is of national importance for this Court to review the case and straighten out things as they should be. The Court ought to take jurisdiction and decide whether the act of the court below in making a breach in the record should stand.

The question above stated is of great national importance and, therefore, ought to be reviewed by this Court.

III.

Whether Davis was denied a full inquiry and fair hearing in the Department of Justice by being illegally induced by the agent of the Federal Bureau of Investigation to sign a statement waiving his claim as conscientious objector?

There is no provision in the regulations for avoiding a hearing on the claim made by a conscientious objector by getting him to elect in writing that he bases his claim on appeal solely as a minister of religion. The statute and regulations are mandatory that there shall be an investigation.

The United States Attorney had knowledge that the petitioner had been denied his claim as a minister, the IV-D classification, and that the only question that remained for the appeal board to determine was the claim of petitioner that he was a conscientious objector. [44-47] Yet, notwithstanding this knowledge, the United States Attorney, knowing that if a waiver of the conscientious objector claim was taken from the petitioner by the agent of the F.B.I. he would automatically be placed in Class I-A by the appeal board, authorized the illegal procedure that is here complained of. [44-47]

The testimony of the F.B.I. agent in this case shows there was no investigation. The Department of Justice side-stepped this responsibility by getting the petitioner to sign the statement in evidence. [45] No such hearing was ever held. The mandatory responsibility was again evaded by the Department of Justice through the strategem and ruse of a written waiver signed by the petitioner.

The Selective Service Regulations give a registrant the right to press simultaneously before the selective service boards as many claims as the law permits him to make. A man may be a farmer, a father of children and a judge at one time while registered before a board. The law permits him to show all three of them and urge all three of the grounds for exemption or deferment to the board. It is up

to the board, in accordance with the regulations, to give him the lowest classification possible. (See Sections 1622.1, 1622.2 and 1623.2 (32 C. F. R. §§ 1622.1, 1622.2 and 1623.2).) Section 1623.2 provides for the consideration of the various classifications in an order, beginning at the lowest class which is V-A and going on up the list until the highest on the list is reached, which is I-A.—See 32 C. F. R. § 1623.2.

There is absolutely nothing in the act or the regulations that authorizes the Department of Justice or the Selective Service System to require that a person waive one exemption in order to claim another. The regulations have a contrary spirit.—See Local Board Memorandum No. 41, pp. 65-66 of the petition for writ of certiorari in the companion case, *Neal* v. *United States,* which supports petitioner here.

In *Cox* v. *Wedemeyer,* 192 F. 2d 920 (9th Cir. 1951) the Government contended that because the registrant had appealed from the local board to the board of appeal on only one ground, that of the ministry, he had waived the other ground of conscientious objection as a basis for exemption. The court rejected the argument. It held that the duty of the boards under the law was to consider all grounds for exemption that may appear in the file. The court held that the registrant did not have to select any particular ground. It declared that he could insist on all the grounds of exemption raised in the record. This decision augments the position of the petitioner supported by the regulations above quoted.

The illegal policy of representing to ignorant registrants by Government agents who are lawyers, that it is advisable to sign waivers of the conscientious objector claims where the main claim of the registrant is the ministry is a fraud and misrepresentation. It is an illegal denial of due process of law.

The petitioner had the right to rely upon the representations made by the agent. He did, to his injury, because they were misrepresentations.

Under the procedure established by the regulations the ministerial claim had already been denied by the appeal board when the agent approached the petitioner and told him that it would be wise to sign the statement waiving the conscientious objector status.—See the entry on the appeal board minutes dated August 29, 1950, page 8 of the questionnaire. [9, 44-47]

The only claim that remained was the conscientious objector claim when the file was referred to the Department of Justice by the appeal board. When they tricked petitioner into signing the waiver, that ended the job that had been placed in the hands of the department by Congress and the appeal board. The procurement of the waiver *ipso facto* resulted in the I-A classification on the return of the file and the waiver to the appeal board. This was fraud and misrepresentation that caused a grievous injury to the petitioner.

The activity of the agent of the F.B.I. in tricking the petitioner into giving up his conscientious objector claim and the authorizing of the procedure by the United States Attorney were pursuant to the standard process fixed by the Department of Justice. That established procedure is illegal. It is provided for by Circular No. 3461, Supplement No. 9, dated September 28, 1943, Circular No. 3461, dated August 4, 1944, Circular No. 4063, Supplement No. 2, dated December 6, 1948, and Circular No. 4063, Supplement No. 5, dated July 18, 1949. (See Appendix A, pp. 55-64, petition for writ of certiorari in the companion case, *Neal* v. *United States*.) The Court can take judicial notice of these regulations. (See *Bowles* v. *United States*, 319 U. S. 33, 35.) One of these orders of the Attorney General was offered in evidence but excluded. [32-33]

The importance of the question of law involved in this point is clearly demonstrated by the discussion appearing under the heading "Reasons for Granting the Writ" at pages 21 to 28 of the petition for writ of certiorari in the companion case of *Neal* v. *United States*. Reference is here made to the discussion appearing there. It is incorporated

here as though made at length. The Court is requested to read at that point in behalf of the petitioner. (See also Appendix A to the petition for writ of certiorari in that case at pages 55 to 64.) In the petition for writ of certiorari in the *Neal* case just referred to, reliance is made upon *United States* v. *Knight*, No. 20,283 Criminal, Northern District of Ohio, April 25, 1951. (See the petition, page 22, and *United States* v. *Stephens*, No. 20,284 Criminal, Northern District of Ohio, April 25, 1951. See the petition, page 24.) These holdings were called to the attention of the trial court. That court rejected them and relied upon *United States* v. *Mansavage*, 178 F. 2d 812 (7th Cir.). [35-36, 53-54, 63] The decision in the *Mansavage* case is not in point. Mansavage was not deprived of an investigation and hearing in the Department of Justice. These were conducted. The report of the hearing officer and the investigation sustained his claims. He *voluntarily* withdrew his claim as a conscientious objector so as to get rid of the conscientious objector classification, IV-E, that had been given to him by the appeal board as a result of the investigation, hearing and recommendation by the Department of Justice. Here there was no such situation as in *Mansavage, supra.* Here there was an *involuntary* withdrawal of the claim or a waiver of it by reason of the illegal procedure employed by the F.B.I., which had been authorized by the United States Attorney.

It is submitted that the above question is of great national importance. Shall the Department of Justice be permitted to short-circuit the plain intention of Congress? Can the rights of registrants be bypassed through an illegal interpretation of the regulations that a registrant must elect between claiming the conscientious objector status and claiming the ministerial exemption. The regulations allow both to be made simultaneously. (*Cox* v. *Wedemeyer*, 192 F. 2d 920 (9th Cir.)) The law has been plainly sidestepped by the ruse resorted to by the agent of the F.B.I.

in this case. A great injury would be done to the law, the intent of Congress, and to the rights of registrants throughout the nation in hundreds of cases if the procedure resorted to by the Department of Justice in this case is approved here.

IV.

Whether error was committed by the trial court in refusing to give instructions to the jury about the denial of a full and fair hearing before the local board and the illegal taking of involuntary waiver of the conscientious objector status by an agent of the Federal Bureau of Investigation?

The testimony of petitioner and his brother cannot be rejected purely because petitioner was a party and his brother had been convicted of violating the draft law. Especially must their testimony be considered undisputed where the draft board's failure to make a record of hearing corroborates the testimony that there was no hearing. Their testimony was corroborated by the clerk of the board who testified that the records of the board indicated that there was no hearing upon the personal appearance. [20] Neither the petitioner nor his brother was impeached on cross-examination or contradicted by any witness on rebuttal. The Government, in fact, failed to call the clerk or the board members to dispute anything the petitioner and his brother testified to. Failure to call a witness available to the Government gives rise to the presumption that his testimony would be adverse to the Government and corroborate the testimony of the defendant in a criminal proceeding.—*United States* v. *Di Re,* 332 U. S. 581, at page 593.

Even where the local draft board members were called to the stand and disputed, on rebuttal, some of the evidence given by a registrant at his trial, it did not prevent a court of appeal from holding, as a matter of law, that the undisputed evidence of the petitioner is sufficient to

establish a denial of due process upon a personal appearance.—*Niznik* v. *United States,* 184 F. 2d 972 (6th Cir.).

The holding in *United States* v. *Zieber,* 161 F. 2d 90 (3rd Cir.), that the denial of due process upon a personal appearance was a factual question for the determination of the jury, under proper instructions from the court, is not controlling. In that case the defendant testified that he was permitted to speak only five minutes and was cut off and shut up by the board members. The clerk of the board, however, testified that this was not true, but that the board members permitted him to testify for a period of forty-five minutes. In that case there was a direct contradicting between the witnesses on both sides of the case. It was therefore proper to have the questions of whether the local board failed to comply with the law on the personal appearance submitted to the jury. Compare *United States* v. *Garvin,* 71 F. Supp. 545 (W. D. Pa.), where the principles of law announced in the *Zieber* case, *supra,* were followed and it was held on the undisputed testimony of the defendant that there was a denial of due process by the local board in failing to make a written memorandum of the oral evidence given on the personal appearance. The verdict of the jury was set aside and the motion for judgment of acquittal, renewed after the verdict, was sustained. Should this Court, however, find that there is a question of fact as to the denial of a full and fair hearing by the local board or by the Department of Justice in taking the waiver, then it is submitted that the requested instructions should have been given to the jury by the trial court.—See *United States* v. *Zieber,* 161 F. 2d 90 (3rd Cir.).

In that case the court said:

> "Whether a selectee has or has not been afforded due process of law by the Selective Service agencies, there being disputed fundamental questions of fact as in the case at bar, should have been determined by the jury under proper in-

structions from the court. If the jury had believed that Zieber had given new or further information to his Local Board or had endeavored to give new or further information to the Board and had been prevented from doing so by the action of the Board, under a proper charge from the trial judge the jury could and should have found Zieber not guilty of failing to comply with the order of the Local Board to entrain for work of national importance. Zieber was not under a duty to comply with an illegal order. The court below did not present the important questions of fact, hereinbefore outlined, to the jury for its determination or instruct the jury that action of the Local Board contrary to the Act or regulations 'would be lawless and beyond its jurisdiction'. *Estep* v. *United States,* 327 U. S. 114, 121. The court's charge did not deal with these essential points.

"The learned Judge in fact charged the jury that if the members of the Local Board 'endeavored honestly and fairly to comply with' the provisions of the Selective Training and Service Act and the applicable regulations 'then the fact that they may have made errors could not be complained of in the courts'. He went on to say that 'It would be no defense to an indictment that they had honestly made a mistake, because if they honestly made a mistake then it was the duty of the registrant to obey that order and to report for induction and be inducted.' This statement of law is incorrect. Good faith and honest intention on the part of the Local Board is not enough. There must be full and fair compliance with the provisions of the Act and the applicable regulations."

It is respectfully submitted that this question is an important one that ought to be determined by this Court. The

petitioner here contends that the question is not only important, but he also says that the court below conflicted with the holding of the court of appeals in *United States* v. *Zieber*, 161 F. 2d 455 (3rd Cir.). It rejected the holding of the Court of Appeals for the Third Circuit above quoted.

Conclusion

For the reasons stated, it is submitted that this petition for writ of certiorari should be granted.

Respectfully,

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